Case No. 04-592

IN THE SUPREME COURT OF THE STATE OF MONTANA

ALAN RAY FAULCONBRIDGE, Individually and as Personal Representative of the Estate of Elisha Kay Faulconbridge and Bernice Kay Faulconbridge,

Plaintiffs and Appellants,

v.

STATE OF MONTANA,

Respondent and Cross-Appellant.

RESPONDENT AND CROSS-APPELLANT'S BRIEF

On Appeal from the Fourth Judicial District Court
Missoula County, District Court No. DV 94-79995
Douglas G. Harkin, Dept. 4, Presiding

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Respondent's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

Dated this 29th day of December, 2004.

Attorney for Respondent/Cross Appellant

I. STATEMENT OF THE ISSUES FOR APPEAL

1. Whether the District Court abused its discretion in its evidentiary rulings regarding witness Ken Kailey.

2. Whether the District Court erred in denying discovery regarding prior accidents and whether that issue is moot.

3. Whether the District Court abused its discretion in precluding evidence of a dissimilar accident at the same location six years prior.

4. Whether the District Court abused its discretion regarding its rulings on State of Montana (hereafter Montana) witness James Weaver.

5. Whether the District Court erred by refusing to issue a jury instruction stating that a violation of the MUTCD is negligence per se.

II. STATEMENT OF THE ISSUES FOR CROSS APPEAL

1. Whether the District Court erred in refusing to grant Montana summary judgment because it owed no duty to Plaintiffs, or alternatively whether the District Court incorrectly instructed the jury on the duty owed by Montana.

2. Whether the District Court erred by preventing Montana from presenting evidence of the real cause of the accident, which included Jason Weaver's intoxication, his excessive speed, his inattentive driving, and his defective headlight.

3. Whether the District Court erred in not allowing evidence of Jason Weaver's intoxication, speed, inattentive driving, and defective headlight to explain the duty held by Montana and lack of breach of that duty.

4. Whether the District Court erred in not allowing evidence of intoxication, speed, inattentive driving, and the defective headlight after Plaintiffs opened the door to those issues during trial.

5. Whether the District Court erred in refusing to allow evidence of Elisha Faulconbridge's contributory negligence.

III. STATEMENT OF THE CASE

On the night of August 7, 1992 Elisha Faulconbridge died in a motorcycle accident caused by an intoxicated driver, driving inattentively, too fast for conditions, and with a defective headlight. The accident occurred on Juniper Drive, which is a road leading to Milltown Dam a few miles east of Missoula, Montana. Plaintiffs Alan and Bernice Faulconbridge brought this action against Jason Weaver, the driver of the motorcycle; Montana Rail Link; Missoula County; and the State of Montana. They sought damages for the wrongful death of their daughter, Elisha Faulconbridge. The Faulconbridges alleged Montana negligently signed and maintained Juniper Drive. Before trial, Faulconbridges settled with all Defendants except Montana. Following a ten-day jury trial, the jury returned a

verdict in February of 2004 finding Montana not negligent. Both parties now appeal several of the District Court's rulings.

IV. STATEMENT OF THE FACTS

A. Critical Facts not Discussed by Plaintiffs.

Jason Weaver was intoxicated when Elisha Faulconbridge chose to ride on his motorcycle and when he wrecked. Dkt. 386 - Offer of Proof, p. 1-4. Evidence suggests Elisha herself had been drinking leading up to the accident. Id. p. 4-5. Jason Weaver was likely visibly intoxicated leading up to the motorcycle ride. Id. p. 1-4. Weaver's state of intoxication impaired his ability to operate the motorcycle. Id. A sign hanging on the overpass at the time of the accident reflected brightly at 765 feet on the high beam of a normal motorcycle headlight. Id. at p. 9. The accident happened at night and the headlight on Jason Weaver's motorcycle was not functioning properly. Id., p. 7. Jason Weaver was also speeding. Id. p. 7-8.

At the accident scene emergency responders smelled alcohol on Elisha's breath. Id. p. 5. The officers also smelled alcohol on Jason Weaver. Id. at 2. Jason Weaver had a blood alcohol content (BAC) of .09%, approximately one hour and twenty-two minutes after the accident. Id. Mr. Weaver's BAC at the time of the accident was .10% or higher, which impaired his ability to perceive and react. Id. The investigating officers determined that the accident was caused by an

inattentive driver who was impaired by alcohol, traveling with a defective headlight, and traveling too fast for conditions. Id. p. 7-8. The investigating officers determined that signing, maintenance, and design was not a cause of the accident. Id. Weaver received a reckless driving citation for the accident. Id. p. 7. Board certified forensic civil engineer, David Johnson, reconstructed the accident and determined that Jason Weaver, and not the signing and maintenance of the road, caused the accident. Id. 8-9.

At the time of the accident, Montana had no signing or maintenance responsibility for the road in question; that responsibility had been taken over by Missoula County. Agreement attached as App. A; refused as Montana's Trial Exhibit D, R. 1918; See also Dkt. 218, p. 3-4, Montana's summary judgment brief.

B. Facts Surrounding the Accident.

On the afternoon of August 7, 1992, 15-year old Elisha Faulconbridge was baptized in the Blackfoot River at Johnsrud Park east of Missoula, Montana. R. 294-95. Following the baptism the family had a picnic. Id. Family acquaintance, 23 year old Jason Weaver, attended the picnic and drank alcohol. Dkt. 386, p. 2. Following the baptism various friends gathered at 30 year old Aaron Azure's trailer house at West Riverside near Bonner, Montana. Id. p. 3. Elisha and her two sisters Sara and Alana were there. Id. Jason Weaver was at Azure's house anywhere from

two to four hours and left with Elisha Faulconbridge at approximately 11:00 PM. Id. p. 4.

Sometime after 10:00 PM, sisters Elisha, Alana, and Sara Faulconbridge decided to go for a motorcycle ride with Chad McCarthy, Randy Surges, and Jason Weaver. R. 245-46. Elisha rode with Jason Weaver. R. 246. None of them wore helmets, although Weaver twice requested Elisha to wear one. Dkt. 386, p. 6. At the end of the road, the Milltown Dam road turns to the right and goes under a railroad trestle, owned and maintained by Montana Rail Link, to private property owned by Montana Power Company at the time. (Complaint, ¶¶ VIII, X, XI; MRL's Answer). Weaver failed to negotiate the curve. R. 273. Elisha Faulconbridge hit the railroad trestle abutment. R. 273. She was pronounced dead on arrival at the St. Patrick's Hospital emergency room. R. 1260-61.

C. ***Facts Regarding the Road in Question.***

This road was constructed in conjunction with the national interstate project in the 1950s. R. 1583. The underpass was built in approximately 1908 under the Northern Pacific Railroad. R. 275. The interstate blocked the access road serving the Montana Power Company (MPC) dam (now known as Milltown Dam). R. 1583, 1596-98, 1821. The Federal Highway Administration had the Montana State Highway Commission design the frontage road to provide private access to the

MPC property. R. 276, 1584.

The road, where the accident happened, served nothing other than that private property. R. 460, 1828. When it was built, the plans were reviewed and approved by the Federal Highway Administration (FHA). R. 1584; 1837-38. When the project was completed in 1966, it was inspected and approved by the FHA. Id. and R. 1590. It had been in use for about 26 years before this accident happened. R. 278.

D. Facts Relating to Procedural History.

Montana has at all times denied that it was negligent or that it caused the accident and injuries to Ms. Faulconbridge. Answer, Dkt. 12. Montana Rail Link filed a third-party complaint against Jason Weaver, alleging his negligence caused the accident. Dkt. 19. Weaver counterclaimed against Montana, Missoula County, and Montana Rail Link. Dkt. 60. Montana answered the counter-claim denying negligence and causation and asserted by cross-claim that Weaver was the cause of the accident. Dkt. 62. Plaintiffs later reached a settlement with Missoula County, Montana Rail Link, and Jason Weaver, who then were dismissed. At trial, the district court refused to allow Montana to present evidence of Weaver's intoxication, speed, inattentive driving, and defective headlight, relying on Plumb v. Fourth Judicial District Court (1996), 279 Mont. 363, 927 P.2d 1011.

The court's rulings severely prejudiced Montana's right to a fair trial. The evidence should have been admitted to establish that Montana did not breach any duty to Plaintiffs and that it did not cause the accident. Montana therefore filed a Writ of Supervisory Control dated October 29, 2002. This Court refused jurisdiction.

V. ARGUMENT

The jury's verdict should stand. The District Court did not err or abuse its discretion in its rulings on the issues presented by Plaintiffs' appeal. The District Court had discretion to limit Ken Kailey's testimony to factual issues because he was not properly identified as an expert in response to discovery or in accord with the Court's scheduling order. Regardless, this issue is moot because the Court did allow him to offer expert opinions. The District Court correctly quashed Plaintiffs' overly broad subpoena regarding accidents near the same location, but regardless, that issue is also moot because Montana inadvertently disclosed that information to Plaintiffs. Retired State employee, James Weaver, was allowed by law to be Montana's representative at trial. Lastly, Plaintiffs were not entitled to a jury instruction stating that a violation of the MUTCD is negligence per se.

If this matter is remanded for any reason, this Court should correct several rulings of the District Court. The District Court erred by refusing to grant Montana

summary judgment on the basis that at the time of the accident Montana had no duty to sign or maintain the road. The District Court also erred by preventing Montana from proving the real causes of the accident, including Jason Weaver's intoxication, the speed he was traveling, his inattentive driving, and his defective headlight. This evidence was also admissible on the issues of duty and breach. The District Court also erred in not allowing evidence of Jason Weaver's actions after Plaintiffs opened the door to those issues during trial. Lastly, the District Court erred in refusing evidence of Elisha Faulconbridge's contributory negligence.

A. Standard of Review.

Faulconbridge's appeal issues B, D, and E are based on evidentiary rulings. The standard of review is whether the District Court abused its discretion. City of Helena v. Kortum, 2003 MT 290, ¶ 28, 318 Mont. 77, ¶ 28, 78 P.3d 882 ¶ 28. The question is not whether the Supreme Court would have reached the same decision. Glacier Tennis Club at Summit, LLC v. Treweek Const. Co., Inc., 2004 MT 70, ¶ 47, 320 Mont. 351, ¶ 47, 87 P.3d 431, ¶ 47. For a court to abuse its discretion, it must act arbitrarily, without employment of conscientious judgment, or exceed the bounds of reason resulting in substantial injustice. Perdue v. Gagnon Farms, Inc., 2003 MT 47, ¶ 8, 314 Mont. 303, ¶ 8, 65 P.3d 570, ¶ 8. An abuse of discretion is not reversible error absent prejudice. Christofferson v. City of Great Falls, 2003

MT 189, ¶ 9, 316 Mont. 469, ¶ 9, 74 P.3d 1021, ¶ 9.

The grounds for Faulconbridges' appeal issues C and F are arguably questions of law. The Supreme Court reviews them *de novo* to determine whether they are correct. See Bruner v. Yellowstone County (1995), 272 Mont. 261, 265, 900 P.2d 901, 903.

All of the issues raised by Montana's appeal are based on mistake of law, which must be reviewed *de novo*.

B. Ken Kailey Issues.

Plaintiffs claim that Mr. Kailey was not allowed to testify concerning his opinions on the additional placement of signs or his opinions concerning his belief that the roadway was dangerous. App. Br., p. 8. This is not true. Mr. Kailey testified, over Montana's objection, that in his opinion additional signs were necessary on the road. R. 2007. He gave his opinions in detail that speed signs, curve signs, a low clearance sign, and delineators were necessary. R. 2007-08. He gave his opinion that the signing in place before the accident was not adequate and that the road was not safe. R. 2008. In closing argument, counsel for Plaintiffs was even allowed to argue: "it took Ken Kailey one trip down that road to know the road was defective, unsafe, and needed signing." R. 2080. Plaintiffs cannot now claim that the district court erred in excluding evidence that was not excluded at

all. This claim is moot.

In addition, the Court had discretion to exclude opinion testimony from Ken Kailey. Pursuant to the Court's scheduling order and the Defendant's interrogatories, Plaintiffs had a duty to disclose all expert witnesses, as well as a summary of their expected opinions. Plaintiffs never disclosed Ken Kailey as an expert. The District Court initially determined the Plaintiff's discovery abuse warranted exclusion of Kailey's expert testimony. This Court has routinely recognized that the trial court is vested with great latitude in ruling on the admissibility of expert testimony. Christofferson, ¶ 8.

On April 10, 1996, Montana served Plaintiffs with a request asking for detailed information regarding all experts Plaintiffs anticipated calling at trial. App. B, Int. No. 8. Montana also requested a brief summary of the expected testimony for fact witnesses. App. B, Int. No. 7. Plaintiffs simply responded "will supplement." Id. No information regarding Ken Kailey was ever provided. Montana specifically requested Plaintiffs to supplement their discovery responses approximately a month before trial. App. C Again, Plaintiffs provided no information regarding Ken Kailey.

The controlling scheduling order required the names and addresses of Plaintiffs' experts to be disclosed to Montana by March 18, 1998. Dkt. 98.

Plaintiffs never disclosed Ken Kailey as an expert. At trial, Plaintiffs acknowledged that they intended to use Kailey as an expert. R. 770. They also acknowledged that they never disclosed him as an expert. R. 744. Nonetheless, they attempted to elicit expert opinions from him. T. 744 - 765. Plaintiffs sought to elicit opinion testimony on the subjects of road friction, whether the underpass provided for safe passage, and proper sign placement. Id. Montana had to object numerous times. Id.

Plaintiffs recognize that "it has long been the rule in Montana that an expert should be excluded when the expert has not been timely and adequately disclosed." App. Br., p. 36; R. 1605. However, Plaintiffs seek to apply the law in a discriminatory manner to exclude only Defendant's witnesses. The rules of civil procedure are premised upon a policy of liberal and broad discovery. Burlington Northern v. District Court (1989), 239 Mont. 207, 216, 779 P.2d 885, 891. The underlying policies of Rule 26, M. R. Civ. P., are to eliminate surprise and to promote effective cross-examination of expert witnesses. Hawkins v. Harney, 2003 MT 58, ¶ 21, 314 Mont. 384, ¶ 21, 66 P.3d 305, ¶ 21. Exclusion of Kailey's testimony was proper. Massman v. City of Helena (1989), 237 Mont. 234, 241-42, 773 P.2d 1206, 1210-11. Plaintiffs had *nearly eight years* to disclose Kailey as an expert witness. This was never done and the district court acted well within its

discretion in excluding his testimony. Id.

Additionally, the Court's scheduling order required disclosure of all expert witnesses. It did not simply require disclosure of Rule 26(b)(4) or retained experts. Plaintiffs offer no reason for failing to disclose Ken Kailey as an expert in accord with the Court's Scheduling Order. This alone is enough to warrant exclusion. Rocky Mountain Enterprises, Inc. v. Pierce Flooring (1997), 286 Mont. 282, 298-99, 951 P.2d 1326, 1336-37.

Plaintiffs have misconstrued Rule 26(b)(4). They argue that since lay witnesses with specialized knowledge do not fall within 26(b)(4), they have no obligation to answer discovery regarding such witnesses and no duty to identify them in accord with the Court's Scheduling Order. All that Rule 26(b)(4) provides is that discovery of facts known and opinions held by experts acquired or developed in anticipation of litigation may be obtained only by interrogatory. Upon motion the Court may order further discovery. Rule 26(b)(4) says nothing about facts known and opinions held by experts who were not acquired in anticipation of litigation. Neither does Rule 26(b)(4), or any law cited by Plaintiffs, hold that a party is excused from answering discovery or complying with a scheduling order for an expert who did not acquire his facts or opinions in anticipation of litigation. Parties must still answer discovery requests.

Other jurisdictions have rejected the Plaintiffs' flawed argument. In Clark v. Raty, 48 P.3d 672, 674 (Idaho App. 2002), the plaintiffs argued the opinions of a treating physician were not discoverable because they were not "acquired or developed in anticipation of litigation or for trial," pursuant to the Rule 26(b)(4) of the Idaho Rules of Civil Procedure. Rejecting that argument, the court wrote:

> Although Clark is correct that a treating physician's knowledge that was not developed for purposes of litigation is not subject to Rule 26(b)(4), the conclusion that he then draws—that such testimony is entirely sheltered from discovery—draws no support from the language of that rule or the remaining discovery rules. Rule 26(b)(4) restricts the methods of discovery that may be utilized to obtain the opinions and information developed by experts for purposes of the litigation. **The rule does nothing to prohibit or limit discovery of expert opinions that were not developed for litigation purposes. Therefore, expert testimony that is not subject to the discovery limitations of Rule 26(b)(4) is not immune from discovery but, to the contrary, is subject to the full panoply of discovery that is otherwise authorized by the civil rules.**

Clark, 48 P.3d at 674 (emphasis added); See also Lee v. Knutson, 112 F.R.D. 105, 108 (N.D. Miss. 1986) (There is simply no reason to hold that non-26(b)(4) trial experts may not be discovered by way of the same interrogatories as 26(b)(4) trial experts); Smith v. Paiz, 84 P.3d 1272, 1276 (Wyo. 2004) (Indeed, even without an examination of case law, the clear language of the rule is at odds with plaintiffs' argument that it [Rule 26(b)(4)] limits the definition of an expert to one whose

opinion was acquired or developed in anticipation of litigation). Plaintiffs themselves recognize this law. In their appellate brief they acknowledged that witnesses like Ken Kailey, "are ordinary witnesses" "*subject to normal discovery.*" App. Br, p. 15. Montana served normal discovery on Plaintiffs in regard to Ken Kailey and Plaintiffs never responded. Plaintiffs cannot now take advantage of their own wrong. M.C.A. § 1-3-208 (2003).

The only Montana case cited by Plaintiffs, Ostermiller v. Alvord (1986), 222 Mont 208, 720 P.2d 1198, does not establish that the District Court abused its discretion. Ostermiller was a medical malpractice case that involved a treating physician who the district court allowed to offer some opinion testimony. The doctor had been identified ten months before trial. Because the witness was a treating physician, the defendant obviously expected him to have medical opinions and took his deposition. Further, the opinion in the Ostermiller case does not suggest that the defendant asked for anything more than simply the names of potential experts, which Plaintiff provided in that case.

Regardless, Plaintiffs' argument that Mr. Kailey should be compared to a treating physician is not persuasive. A treating physician is a unique witness because of the context in which he becomes familiar with the plaintiff's injuries. Schreiber v. Estate of Kiser, 989 P.2d 720, 723 (Cal. 1999). As the District Court

explained, Ken Kailey was not within the chain of circumstances like a doctor would be. R. 768-769. A treating physician's testimony is also limited to a patient's relevant medical history with that particular doctor. Salas v. United States, 165 F.R.D. 31, 33 (W.D.N.Y. 1995). To extend a treating physician exception to an ordinary fact witness would completely undermine the basic policies of the expert disclosure requirement, and the exception would swallow the rule. No courts have extended the law in such a manner.

Plaintiffs cite several other state and federal cases in an attempt to support their position. None of those cases, however, hold that a party is immune from complying with discovery or a court's scheduling order. Moreover, this Court has already ruled on this very issue. In Massman v. City of Helena (1989), 237 Mont. 234, 773 P.2d 1206, the plaintiffs argued that the district court improperly excluded the expert testimony of two of its experts who were disclosed to the defendants as lay witnesses. Id. 773 P.2d at 1210. Noting that the district court has discretion on rulings of evidence, this Court upheld the ruling based upon the prejudice imposed upon the defendant. Id. This Court found significant the fact that the plaintiff failed to disclose the two proposed experts even though the defendant requested the names of the experts in its interrogatories. Id. Likewise, if Plaintiffs wanted to elicit expert testimony from Mr. Kailey, they should have

simply properly identified him.

C. ***Discovery of Other Accident Issue.***

Plaintiffs' opening brief suggests that the issue before the District Court was whether general information regarding other accidents at the same location was discoverable. Plaintiffs state that they requested records from the Montana Highway Patrol regarding accidents which occurred at the same site and that the District Court denied discovery into other accidents. App. Br, pgs. 16-17. This is not accurate. In truth, Plaintiffs served an overly broad subpoena on the Highway Patrol seeking all documentation regarding accidents for Section 21, Township 13 North, Range 18 West, for the years 1987 - 1997. (See subpoena, Dkt. 99.) The issue before the District Court was strictly whether this subpoena was enforceable, which it was not. (Brief and Order, Dkt. 101 and 106.) Plaintiffs did not serve interrogatories or other discovery requests seeking information about prior accidents. The District Court quashed the subpoena noting that a subpoena cannot be used to obtain privileged documents. Dkt. 106. However, the Court left open the option for Plaintiffs to make additional, better defined arguments or requests to obtain information regarding other accidents. Plaintiffs never pursued this further, presumably because they already had the requested documentation.

1. Plaintiffs' claim is moot.

What Plaintiffs have not told this Court, is that before Montana could move

to quash the subpoena, Ray Jenkins, the records custodian for the Highway Patrol, provided Plaintiffs with a list of all accidents that occurred in the area since 1979. (Dkt. 101, 2-3-98 brief and motion.) Montana thus had to file a motion in limine to prohibit the list from being introduced into evidence. Id. The list of all accidents provided by the Highway Patrol that occurred in that square mile was attached as Exhibit A to that brief. Only one other accident had occurred at the underpass in question.

Plaintiffs previously acknowledged that they had been provided the requested information. In an attempt to use the list at trial, Plaintiffs argued that Montana had waived any privilege to the documents by voluntary disclosure of the documentation relating to other accidents. (Dkt. 105, pgs. 4-5, Plaintiffs' Objection to Defendant's Motion to Quash.) Plaintiffs' current claim that they were prejudiced by not obtaining information regarding other accidents is inaccurate and their motion for remand on this issue should be denied.

Plaintiffs' claim is also moot because evidence of prior accidents is not admissible, as discussed in Section D below.

2. The District Court correctly quashed the subpoena seeking any and all documentation of other accidents in the same general area of this accident.

The Court ruled on this issue on February 11, 1998, noting that Plaintiffs'

request for records on their face fell within the purview of 23 U.S.C. § 409 (1987) and M.C.A. § 61-7-114 and were therefore protected from discovery without court order. Dkt. 106. Plaintiffs do not address this authority. Instead, they begin by citing case law discussing when evidence of prior accidents is generally admissible. Admissibility of other accidents is not the issue here. That issue is discussed in Section D of this brief. The issue is whether Plaintiffs' subpoena is enforceable. Very clear Montana and federal law explain that accident records are privileged. 23 U.S.C. § 409; Mont. Code Ann. § 61-7-114. They cannot be discovered, nor can the data in them be admitted in a state court proceeding for damages from an occurrence at the location of the report. These statutes are valid and enforceable in Montana and across the nation. Plaintiffs have not offered a single Montana case suggesting that § 61-7-114 is not enforceable or is unconstitutional. Montana's brief, which thoroughly sets out the law and reasoning on this issue, is included in the Appendix as App. D.

Plaintiffs misconstrue § 61-7-114(2), arguing that it specifically allows for the discovery of other accident information by court order. Interestingly, Plaintiffs cite only a portion of § 114(2), and fail to cite the critical portions of the statute which explains that Plaintiffs are in fact not entitled to the records. Accident reports by law enforcement officers are unavailable except to a limited class of

persons, and Plaintiffs are not within the class. Accident reports and supplemental information filed as required by these laws are confidential and not open to general public inspection. See § 61-7-114.

Plaintiffs also incorrectly argue that Article II, Sections 9 and 16 of the Montana Constitution and M.C.A. § 2-6-102 (2003), somehow control over § 61-7-114 and 23 U.S.C. § 409. Plaintiffs never explain how. This Court has "repeatedly held that a specific statute controls over a more general statute." In re Marriage of Denowh ex rel. Deck, 2003 MT 244, ¶ 15, 317 Mont. 314, 318, ¶ 15, 78 P.3d 63, 65, ¶ 15. Specific statutes govern this issue. § 2-6-102, cited by Plaintiffs, even provides that "every citizen has a right to inspect and take a copy of any public writings of this state except . . . ***as otherwise expressly provided by statute***." Further, Plaintiffs never raised the constitutional arguments at the district court level. This Court has very clearly stated that a party may not raise new issues on appeal, and this Court will not consider new arguments first raised on appeal because of the fundamental unfairness of faulting a district court for failing to rule correctly on an issue it was never given the opportunity to consider. Unified Industries, Inc. v. Easley, 1998 MT 145, ¶ 15, 289 Mont. 255, ¶ 15, 961 P.2d 100, ¶ 15.

Lastly, citing Pierce County v. Guillen, 537 U.S. 129, 145 (2003), Plaintiffs

argue that 23 U.S.C. § 409 does not apply because of their unsupported and mistaken assumption that Montana did not compile the information for purposes of developing highway safety improvement. App. Br. p. 20. Plaintiffs even suggest that the accident records kept here have nothing to do with safety enhancements or identifying potential accident sites. Id. This is not true, as explained fully in Montana's January 30, 1998 brief (Dkt. 101, pgs. 2-3.), if a state chooses to participate in federal financed safety programs, as Montana obviously has, the state is required to compile data to assist in the identification, planning, implementation, and evaluation of safety programs and projects. See Highway Safety Act of 1973 (codified as amended at 23 U.S.C. § 101, *et seq.*) Again, Plaintiffs did not make this argument to the district court despite Guillen being decided over a year before this case went to trial. Plaintiffs cannot raise new arguments on appeal.

D. Admissibility of Other Accident Issues.

The District Court did not abuse its discretion in prohibiting evidence of a prior, very dissimilar automobile accident that occurred near the same location six years earlier. Any probative value the prior accident may have had was outweighed by its prejudicial effect, especially when Montana would not have been allowed to fully explain the differences in the accidents.

1. The two accidents were not similar enough to have probative value.

Faulconbridges argue that "a strikingly similar accident in 1986" occurred at the same location and gave Montana an opportunity to remedy the condition before 1992. (App. Brief, p. 21.) This is not accurate. The evidence demonstrated, and the district court recognized, that the two accidents were far from "strikingly similar." As explained by the district court, the differences included at least the following:

- car versus motorcycle accident and different safety considerations;
- dynamics of vehicle control were dissimilar;
- daylight versus night accident with dissimilar interaction of light on visible objects;
- alcohol was involved in this accident but not in 1986 accident;
- dust was not a factor in the prior accident;
- a sign was present in this case but not at the time of the 1986 accident.

(Dkt. 286, p. 5-6; Dkt. 302, p. 7-8) Additionally,

- Weaver's headlight was defective which impaired his ability to see either the structure or any signs. Dkt. 386, p. 7

In Montana, while evidence of prior accidents is not admissible for the purpose of proving negligence, at times such evidence may be admissible to show the existence of a danger or defect or notice or knowledge thereof. Kissock v. Butte Convalescent Center, 1999 MT 322, ¶ 15, 297 Mont. 307, 312, 992 P.2d 1271, 1274. However, this Court has required that the prior accidents be

"substantially similar to" and "not too remote from the accident in question" in order to be relevant and admissible. Kissock, ¶ 16. This Court noted that as time and circumstances become less similar to the accident under consideration, the probative value of the occurrence of such prior accidents decreases, while the prejudicial value of such evidence before a jury increases. Id.

The District Court did not abuse its discretion in not allowing evidence of the prior accident.

2. The 1986 accident also had no probative value because it did not put Montana on notice of a defect or dangerous condition.

Plaintiffs' contention that the 1986 accident put Montana on notice of a defect is inaccurate. If the accident put Montana on notice of anything, it was that an accident occurred because of inattentive driving and speed. The officer who investigated the 1986 accident did not determine that a road or signing defect existed. If a defect is suspected, the investigating officer requests an engineering study. Such a study was not requested. The accident report stated that the accident was caused by inattentive driving and speed too fast for conditions. Dkt. 424, p. 16-17; R. at 564. The report was provided to the District Court on numerous occasions, but most recently attached to Defendant's brief opposing a new trial dated March 12, 2004 (Dkt. 424). Report attached as App. E. The 1986 accident

was simply not admissible to show notice.

Regardless, as the District Court correctly explained in its April 22, 2004 Order denying Plaintiffs' motion for a new trial, under Montana law, notice is irrelevant because it is not required to prove duty. Dkt. 437, p. 14. In support of their argument to admit evidence of the 1986 car accident, Plaintiffs again argue that "the district court, in fact, determined that the 1986 accident was sufficiently similar to be relevant to establish notice under the standard set out in Kissock v. Butte Convalescent Center, 1999 MT 322, 297 Mont. 307, 992 P.2d 1271." (App. Br., p. 27, citing Dkt. 302, Order 9, Nov. 2, 2000). Interestingly, Plaintiffs made this very same argument in their motion for a new trial. In its Order denying their motion, the District Court explained that "Plaintiffs incorrectly" made this determination and that position "**is a total mischaracterization of this Court's November 2, 2000 order and memorandum**." Dkt. 437, p. 13 (emphasis added). The District Court then quoted at length from previous orders explaining that it had never held as such. Dkt. 437, p. 13.

As discussed in the District Court's April 22, 2004 Order and in Plaintiffs' appeal brief, Dobrocke v. City of Columbia Falls, 2000 MT 179, 300 Mont. 348, 8

P.3d 71,[1] made it unnecessary to prove "notice" to establish negligence. Because of this, the District Court concluded in its October 3, 2002 Order, Dkt. 330, that the prior accident was unnecessary for Plaintiffs to prove their claim. Plaintiffs' own proposed jury instruction 15A cited Dobrocke stating that notice was not necessary. Dkt. 383. Plaintiffs now argue that Dobrocke has no bearing on this issue but instead the controlling cases are Schuff v. Jackson, 2002 MT 215, 311 Mont. 312, 55 P.3d 387 and Dale v. Three Rivers Telephone Coops., Inc., 2004 MT 74, 320 Mont. 401, 87 P.3d 489. Neither Schuff nor Dale are applicable. Both of those cases hold that where there is a prior notice of a defect or dangerous condition, an increased duty applies. Here, as mentioned above, there was not prior notice of a defect. The 1986 accident, which was not caused by a defect, is the only other accident Montana is aware of on this road.

Although not cited in their appellate brief, in their motion for a new trial, Plaintiffs relied heavily on the recent case of Henricksen v. State, 2004 MT 20, ¶ 13, 319 Mont. 307, ¶ 13, 84 P.3d 38, ¶ 13 in an attempt to show notice is necessary. Henricksen is not applicable. Henricksen involved a situation where this Court found a *defect* as a matter of law, determined that the defect caused both

[1] Plaintiffs incorrectly cite this case in their brief.

accidents, and determined that the *defect* was not corrected. This Court explained the rule of law "when the State has notice of a defect and opportunity to act, it has the duty to cure, remove, or warn of that defect." Henricksen, ¶ 22. Here, we do not have notice of a defect and a defect is certainly not admitted. Henricksen has no bearing on this case. Please also see Defendant's point brief on this issue. Dkt. 398

3. Any possible probative value of the prior dissimilar accident is outweighed by its prejudicial effect unless Defendant is allowed to vigorously cross-examine on all the differences of the accident.

The Montana Supreme Court recognized in Henricksen that under Rule 403, M. R. Evid., evidence of prior accidents must still be excluded if such evidence is more prejudicial than probative. ¶ 73. The trial court has significant discretion. Evidence of the prior accident in this case would have caused extreme prejudice to Montana, especially since Montana was not allowed to explain the differences in the two accidents in light of the District Court's previous orders preventing discussion of Jason Weaver's conduct. Under Montana law, evidence of prior accidents is only admissible if the defendant is given a full opportunity to vigorously cross-examine witnesses and explain the dissimilarities between the accidents and the causes of those accidents. Kissock v. Butte Convalescent Center, 1999 MT 322, ¶ 18, 297 Mont. 307, 312, ¶ 19, 992 P.2d 1271, 1275, ¶ 19. A thorough discussion of this issue is set out in the Court's November 2, 2000 Order,

pp. 3-10, Dkt. 302. The Court also accurately explained how the evidence of the prior accident would have complicated and confused the issues. It would have required cautionary admonitions and instructions, and expanded the time needed for trial. Dkt. 302, pp. 3-10. It would have required "a trial within a trial." The Court correctly excluded evidence of the 1986 accident.

E. Jim Weaver Properly Attended Trial.

The law allowed retired State employee Jim Weaver to attend trial. Additionally, Plaintiffs failed to properly object to his testimony and Plaintiffs were not prejudiced by his presence at trial.

Plaintiffs' characterization of Mr. Weaver as a hired expert is hyperbole. James Weaver worked for the Department of Transportation for thirty years. R. 1579. At the time of the accident, he was the district administrator for the Missoula division. R. 1580-81. He had the responsibility to oversee all transportation functions at the time of the accident, including design and maintenance of the road in question. R. 1579. After the case was filed and before it went to trial, Mr. Weaver retired from the State and became employed as an engineer for a Missoula engineering company known as WGM Group, Inc. R. 1578. Plaintiffs' counsel did not object to Mr. Weaver's testimony based upon Rule 615 at the time of his testimony. R. 1578-79. In fact, as noted by the District Court in its April 22, 2004

Order, when specifically asked by the Court whether counsel for the Plaintiffs objected to James Weaver's testimony as a fact witness, Plaintiffs did not object. Dkt. 437, pgs. 17-20; R. 1609-10.

Mr. Weaver testified at length and the Court then recessed on a Friday. R. 1636-37. It was not until the following Monday, during a hearing conducted out of the presence of the jury where the Court, and not counsel for Plaintiffs, presented the parties with the federal case entitled Opus 3 Ltd. v. Heritage Park, 91 F.3d 625 (4th Cir. 1996), which held that fact witnesses should be precluded under Rule 615, because they can shape their testimony based on other witnesses' testimony. Dkt. 437, p. 18. It was only then that counsel for Plaintiffs voiced a Rule 615 objection. Id.

1. The law allowed Jim Weaver to be Montana's representative at trial.

We find no Montana decision addressing the specific issue raised by Plaintiffs. However, federal cases interpreting the identical language in the Federal Rules of Evidence are persuasive in interpreting the Montana Rule. State v. Delaney, 1999 MT 317, ¶ 15, 297 Mont. 263, ¶ 15, 991 P.2d 461, ¶ 15. Many federal opinions have followed a broad, liberal interpretation of the Rule 615(2) exemption from exclusion, and have allowed the government and other parties who are not natural persons to designate representatives who are not current employees

of the party.

The District Court issued a well-reasoned opinion on this issue, in regard to Plaintiffs' motion for a new trial. Dkt. 437, p. 17-21. The District Court correctly determined that under the applicable law, former employees fall within the exception to exclusion of witnesses in Rule 615, M. R. Evid. The Court relied in part on Roberts v. Galen of Virginia, Inc., 325 F.3d 776 (6th Cir. 2003). In Roberts, the Sixth Circuit reasoned that the purpose of the second exception to Rule 615 is to give parties the right to have a representative present throughout trial. A different interpretation would simply not be fair. In this case, the appointment of James Weaver as Montana's representative was a logical decision because of his job responsibility for the road on which this accident happened. He was ultimately responsible for maintenance and signing of the road until those responsibilities were assumed by Missoula County. He was ultimately responsible for the alleged defects attacked by Plaintiffs. He worked on this litigation for years before his retirement and continued to work on it following his retirement. Plaintiffs most assuredly would have criticized Montana had Mr. Weaver not been called as a witness. The Roberts case clearly allows Montana to name a former employee as its representative pursuant to Rule 615(2).

Plaintiffs' cited case of Opus 3 Ltd. is distinguishable. In that case the

designated representative of Heritage Park, had never been an employee of the corporation. In fact, he had never been an agent, employee, officer or director of Heritage Park. Opus 3 Ltd., 91 F.3d at 630. Plaintiffs' reliance on the case of State v. Flowers, 2004 MT 37, 320 Mont. 49, 86 P.3d 3 is also misplaced. Unlike this case, the criminal Flowers decision did not involve a situation where the State's representative's actions were being questioned. Here, Plaintiffs questioned Jim Weaver's actions in regard to signing and maintaining the road. They attempted to hold the State responsible through its agent, Jim Weaver. In Flowers, the State representative was merely a witness whose decisions were not being questioned. The agent's acts in Flowers could not bind Montana with an adverse money judgment. Montana would have been prejudiced had the person in charge of the road at the time of the accident not been allowed to be present and defend himself. For further analysis see our briefing opposing a new trial, Dkt. 435, and the Court's order on this issue. Dkt. 437.

2. Plaintiffs' failure to object to Mr. Weaver's testimony at the time or move for a mistrial *constitutes waiver of an argument for a new trial on* this issue.

As the District Court explained, the basis for a Rule 615 M. R. Evid. objection was clearly available to Plaintiffs' counsel, who could have provided a timely objection to any testimony, fact, or expert from Mr. Weaver. However,

Plaintiffs failed to do so. Objection after the fact does not support a new trial.

Plaintiffs never moved for a mistrial. Failure to move for a mistrial amounts to waiver. Schino v. U.S., 209 F.2d 67, 73 (9th Cir. 1953). See also Durden v. Hydro Flame Corp., 1998 MT 47, ¶¶ 40-44, 288 Mont. 1, ¶¶ 40-44, 955 P.2d 160, ¶¶ 40-44. Plaintiffs have waived their argument for a new trial on this issue.

3. Weaver's presence at trial was not prejudicial.

As explained by the District Court, a violation of Rule 615, M. R. Evid., during trial constitutes a "trial error" that is not presumptively prejudicial and, therefore, is not automatically reversible. Dkt. 437, p. 20. Plaintiffs' claim of prejudice is based upon the lack of opportunity to voir dire a juror who was an engineer working for CTA Architects Engineers and who had worked with WGM Group, Inc. in the past. The District Court explained that any alleged prejudice by Plaintiffs was refuted by Montana; therefore, if there was any error in allowing James Weaver to testify, or if it is determined on appeal that James Weaver does not qualify as a representative under the exception identified in Rule 615(2), M. R. Evid., then the error was harmless.

Contrary to Plaintiffs' assertions, Jim Weaver, unlike Ken Kailey, was not allowed to present expert testimony. Regarding the claim that Mr. Weaver was allowed to testify as an expert, the trial judge stated: "Oh, I think I did pretty good

in keeping him to just what he said he would talk about." R. 1658. Plaintiffs' counsel's response: "**I think you did, Judge**." Id. (emphasis added).

Perhaps the largest weakness in Plaintiffs' argument is that Montana could have had a different representative at trial who could have listened to the trial testimony and offered substantially the same testimony as Jim Weaver. Defendant, like Plaintiffs, was allowed to be present at trial. Plaintiffs suffered no prejudice by having the employee responsible for the road in question be the representative.

F. MUTCD Issue.

Plaintiffs claim that they were entitled to jury instructions stating that if Montana did not strictly adhere to the MUTCD, "then you must find that Montana was negligent." Appeal Brief p. 40; see also Plaintiffs' proposed jury instructions attached as App. 9 to Plaintiffs' appeal brief. This is an incorrect statement of the law and the Court correctly refused it.[2]

A violation of the Manual on Uniform Traffic Control Devices or "MUTCD" does not establish negligence per se. In determining negligence, the MUTCD is only one factor among many to consider. Schmidt v. Washington

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[2] The State does not believe Plaintiffs presented any evidence that Defendant violated the MUTCD, but that is not the issue before the Court. The issue is whether the jury was correctly instructed in regard to the effect of the MUTCD.

Contractors Group, 1998 MT. 194, ¶ 16, 290 Mont. 276, ¶ 16, 964 P.2d 34 ¶ 16. A violation of the MUTCD may be admissible as evidence of possible negligence, but certainly does not establish negligence per se. Id., ¶ 17.

> Though Plaintiffs correctly note that the Montana State Highway Commission adopted the MUTCD in 1971, they fail to explain that "The MUTCD is not a statute but an administrative regulation." Brockie v. Omo Construction, (1992), 255 Mont. 495, 500-01, 844 P.2d 61, 65. A Montana statute references the regulations, but does not adopt them as law. See M.C.A. § 61-8-202. "[R]ules do not become part of a statute by reference."

Brockie at 65. See also Workman v. McIntyre Const. Co. (1980), 190 Mont. 5, 20, 617 P.2d 1281, 1289. The District Court correctly refused Plaintiffs' jury instructions to the contrary.

VI. CROSS-APPEAL

Although Montana does not believe this case should be remanded, if for any reason it is, this Court should correct several rulings entered by the District Court.

A. The State of Montana did not have a duty to sign or maintain the road at the time of the accident.

Sixteen months before the August 1992 accident, on April 8, 1991, the State of Montana, Missoula County, and the City of Missoula entered into an agreement to exchange maintenance responsibilities on certain sections of road. Agreement refused as Montana's Trial Exhibit D; see also Dkt. 218, pgs. 3-4. Missoula County assumed all signing and maintenance responsibility for the Montana Power-Milltown Dam Road. Id. The road in question was removed from the State

maintenance system, effective July 1, 1992. Id. From that time forward, the County bore ***sole maintenance and signing*** responsibility for it. Id. (emphasis added). Plaintiffs never disputed this fundamental fact. Ken Kailey, traffic department supervisor for Missoula County, acknowledged that the County had maintenance responsibility for the road on the date of the accident. Ken Kailey Dep., p. 5, original in District Court record.

Plaintiffs' complaint filed against Montana in September 1994 alleged only that Montana had a duty to maintain and sign the road. Complaint at ¶ VII, XX. Plaintiffs made no allegations regarding design. For five years, the parties conducted discovery and identified experts with no allegation of design defects. Then, on March 18, 1999, Montana filed a motion for summary judgment. Dkt. 218. Montana explained that it had no duty to maintain and sign the roadway because of the agreement. Id. In response to the motion for summary judgment, Plaintiffs requested to be allowed to amend the complaint and allege the roadway was improperly designed and constructed. Dkt. 233, p. 5. The Court did not allow such an amendment, noting that material amendments are not appropriate after one party has moved for summary judgment. Dkt. 269, Order, June 25, 1999 p. 20. However, the District Court held that Montana "had a duty concerning the original construction and maintenance that was not abated when Montana entered into a

maintenance contract with the County." The Court said:

> The state of Montana [still] does have a duty to keep its roadways in reasonably safe condition for ordinary use; and to construct and maintain roadways so that no latent defect constitutes an unreasonable danger to the public.

(Dkt. 269, pp. 20-21)

The district court erred. Contracts to exchange maintenance duties between governmental entities are appropriate under Montana law and enforced in accord with their terms. M.C.A. § 60-2-204 (2003), and City of Livingston v. State Water Conservation Bd. (1958), 134 Mont. 403, 332 P.2d 913. The existence of a legal duty is a question of law to be determined by the Court. Massee v. Thompson, 2004 MT 121 ¶ 27, 321 Mont. 210, ¶ 27, 90 P.3d 394 ¶ 27. The Complaint against Montana alleged only that Montana failed to maintain and sign the road in question. Montana did not have that duty. In the absence of a legal duty, it is entitled to summary judgment as a matter of law. Rule 56(c), M. R. Civ. P.; Geiger v. Department of Revenue (1993), 260 Mont. 294, 297-98, 858 P.2d 1250, 1252.

Montana should also have been granted summary judgment on the issue of duty to design, because Plaintiffs never sued Montana on that theory. Plaintiffs never even raised the issue of design until after Montana moved for summary judgment. A party cannot amend the Complaint or raise new liability theories after the opposing party has moved for summary judgment. Peuse v. Malkuch (1996),

275 Mont. 221, 228, 911 P.2d 1153, 1157.

In the alternative, if this case is remanded, *at the very least*, the jury should be appropriately instructed regarding the maintenance and signing responsibility at the time of the accident. Although all the parties and the Court agreed that Montana had no duty to sign or maintain the road at the time of the accident, for inexplicable reasons, the District Court refused to allow Montana to explain this. R. 23-34. Montana raised this issue at the pretrial conference. Id. The District Court refused to allow Montana to explain to the jury the true nature of its duty. R. 34. The only apparent reason was that the District Court thought it would weaken Plaintiffs' case. R. 32-34. At trial, Plaintiffs were allowed to present testimony and argue in closing that signing and maintenance of the road caused the accident. R. 2024; 2080; 2082; 2088; 2097. The Special Verdict Form even stated, over Montana's objection, "Was the Defendant, State of Montana, negligent in the design, construction, maintenance or signing of the roadway?" See App. 1 to Plaintiffs' appeal brief. The jury was led to believe that Montana, at the time of the accident, had the duty to sign and maintain the road. This was not true. The District Court erred. If the case is remanded and not dismissed outright for lack of duty, then the jury should be correctly instructed that Montana had no duty to either sign or maintain the road at the time of the accident.

B. ***The District Court erred by not allowing Montana to explain the true cause of the accident.***

The investigating officers determined that the cause of the accident was an inattentive driver who was impaired by alcohol, traveling with a defective headlight, too fast for conditions. Dkt. 386, p. 7-8. Since filing its Answer in 1994, Montana has at all times denied negligence, affirmatively asserted that it did not cause the accident, and affirmatively asserted that it is not responsible for the actions of the persons who did cause the accident. Dkt. 12, Answer, 2nd and 3rd Affirmative Defenses, attached as App. F. However, the District Court prevented Montana from offering this evidence to negate causation. Dkt. 331. The Court's ruling concealed relevant and admissible evidence relating to the cause of the accident from the jury.

Montana filed a Writ of Supervisory control on this issue on October 29, 2002. This Court refused to assume jurisdiction. The Writ largely sets out the Montana's position. App. G. In 1996, after the initial answer was filed in this action, the Montana Supreme Court decided the case of Plumb v. Fourth Judicial District Court (1996), 279 Mont. 363, 927 P.2d 1011, holding that a defendant may not apportion negligence to non-parties. Montana did not seek to apportion negligence to non-parties. Non-parties were not on the special verdict form and the jury was not allowed to apportion negligence to non-parties. However, evidence of

what caused the accident and death of Elisha Faulconbridge is at the heart of this case. In Montana plaintiffs are still required to establish that the defendant caused their alleged injuries and the defendant is still allowed to present evidence rebutting this claim. The Montana Supreme Court has specifically ruled that the conduct of unnamed third parties is relevant and admissible to the issue of causation. Pula v. State, 2002 MT 9, ¶ 17, 308 Mont. 122, ¶ 17, 40 P.3d 364, ¶ 17.

The District Court interpreted Pula to mean that in order to defend against causation and present evidence of other causes, a defendant must plead "superseding, intervening cause" in an affirmative defense. (Dkt. 331, October 3, 2002 Order, p. 5.). That is not the law set forth in Pula or in any other Montana case. Pula is not limited to cases of superseding, intervening cause. Pula allows defendants to present evidence of the actual cause of the accident to demonstrate that it did not cause the accident. Causation is a distinct element of negligence, which must be proven by the plaintiff. Schmidt v. Washington Contractors Group, Inc., 1998 MT 194, ¶ 6, 290 Mont. 276, ¶ 6, 964 P.2d 34, ¶ 6; Gentry v. Douglas Hereford Ranch, Inc., 1998 MT 182, ¶ 24, 290 Mont. 126, ¶ 24, 962 P.2d 1205, ¶ 24. Accordingly, any evidence which establishes a break in the chain of causation is relevant. The notion that a defendant cannot negate cause by informing the jury what the real cause is, would lead to preposterous verdicts. The District Court

erred.

C. *The District Court erred by refusing to allow Montana to rebut breach of duty.*

Does Montana have a duty to design, sign, and maintain roads for intoxicated, speeding, inattentive drivers with defective equipment? Certainly not. However, the District Court's refusal to allow evidence of those issues prevented Montana from rebutting the alleged breach of duty. Although the county had the duty to sign and maintain the road in this case, which completely absolves Montana, absent the contract, Montana generally has a duty to design, maintain, and sign for the ordinary use. See Buck v. State (1986), 222 Mont. 423, 429-30, 723 P.2d 210, 214, overruled on other grounds. Thus, whether the road in question was being put to ordinary use at the time of the accident was a material fact that had to be decided by the jury.

By excluding evidence of intoxication, speed, and the defective headlight, the jury was forced to assume ordinary usage. Montana was prevented from discussing the true standard of care. The District Court effectively ruled that Montana must design and maintain its roadways so that they can be safely used by intoxicated, careless, speeding drivers who have improperly aimed headlights. This is obviously not the case. Montana law actually holds that a driver has a duty to not drive under the influence of alcohol. Buck, 222 Mont. at 429, 723 P.2d at 214.

Further, whether or not a particular set of circumstances comprises ordinary use is a determination to be made by the jury. Walden v. State (1991), 250 Mont. 132, 137-38, 818 P.2d 1190, 1193-94 (1991).

The Court should have admitted the evidence of Weaver's conduct, not to apportion negligence to him, but to give the jury the information it needed to decide the issues of duty, breach, and causation.

D. *Plaintiffs Opened the Door to Jason Weaver's Conduct During Trial.*

Plaintiffs' engineering expert, Don Fenton, testified about "human factors" in road engineering. R. 400. He discussed how signs should be utilized in light of a person's ability to perceive and react. R. 401. He testified regarding how much time is necessary for a normal person to react to a sign. R. 402-03. He testified at length about what an average person would expect, and how an average person would react. R. 537-538. He discussed what engineers expect normal drivers to do. R. 538. On cross examination of State witness Jim Weaver, Plaintiffs' counsel asked leading questions regarding how signing should provide adequate time for a driver to perceive, react, and execute. R. 1679-80. On cross examination of Montana's expert, David Johnson, Plaintiffs' counsel again asked questions about people's reaction times as it relates to signing and design issues. R. 1896. The questioning even implied that Jason Weaver was a reasonable driver. R. 1897.

Plaintiffs opened the door to Weaver's intoxication and the inadequacy of the headlight by injecting the issue of normal perception times and a driver's ability to see and react to signs. In the case at bar, we are not dealing with normal perception and reaction times. We are dealing with impaired perception and reaction, due to intoxication, excessive speed, and inadequate headlights. Montana made these arguments to the District Court. R. 1650-52. The District Court erred. Mr. Weaver's ability to perceive and react is at the heart of this case. If it is remanded, Montana must be allowed to discuss the true facts of the case.

E. Elisha Faulconbridge's Contributory Negligence.

Ms. Faulconbridge had a duty to act reasonably under the circumstances. Whether she did so by drinking and choosing to ride with an intoxicated driver with defective equipment was a question for the jury.

The Montana Supreme Court has consistently held that contributory negligence is a question of fact to be decided by a jury. Dobrocke v. City of Columbia Falls, 2000 MT 179, ¶ 56, 300 Mont. 348, ¶ 56, 8 P.3d 71, ¶ 56. This Court has even gone so far as to hold:

> Even when a defendant is negligent as a matter of law, the issue of contributory negligence on the part of the plaintiff and the degree of comparative negligence, if any, is normally an issue for the jury or fact finder to resolve.

Pierce v. ALSC Architects, P.S. (1995), 270 Mont. 97, 107, 890 P.2d 1254, 1260.

Montana law specifically provides that a passenger who rides with an intoxicated or unsafe driver can be found comparatively negligent. Buck, 222 Mont. at 430-31, 723 P.2d at 215.

Montana should have been allowed to present evidence that Ms. Faulconbridge knew or should have known that Mr. Weaver had been drinking, that his motorcycle was not equipped with a properly working headlight, and that he was speeding, but chose to continue to ride with him. Substantial evidence demonstrates that Ms. Faulconbridge should have known that Mr. Weaver was intoxicated when she chose to ride on the back of his motorcycle. She was with him for approximately four hours in the afternoon when he was drinking alcohol. Dkt. 386, pp. 2-8. They were together at a house later that day and into the evening for two or three hours. Id. Evidence demonstrated the Weaver was visibly intoxicated leading up to the accident. Id. p. 4. Plaintiffs are, of course, entitled to offer their own evidence to rebut comparative negligence. However, the issue should not have been taken from the jury.

VII. CONCLUSION

The District Court did not abuse its discretion or err in its rulings on the issues presented by Plaintiffs' appeal. Plaintiffs received a fair trial. The jury's verdict should stand. However, if this matter is remanded, this Court should correct

the rulings of the District Court, as set forth by Montana above, to provide it with a fair trial.

DATED this 29th day of December, 2004.

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I hereby certify that on the 29th day of December, 2004, a copy of the foregoing was served upon the following by Mail, Express Mail, Hand-Delivery, Fax, or Federal Express:

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